SERVED: October 15, 1993

NTSB Order No. EA-3996

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 1st day of October, 1993

DAVID R. HINSON, Administrator, Federal Aviation Administration, Complainant, v. PETER CRAIG DAUTEL, Respondent.	Docket SE-11671

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge William E. Fowler, Jr., issued on December 11, 1991, following an evidentiary hearing.[1] The law judge affirmed an order of the Administrator suspending respondent's commercial pilot certificate for 30 days for

[1]The initial decision, an excerpt from the hearing transcript, is attached.

violating 14 C.F.R. 91.123(b) and 91.129(h).[2] We deny the appeal.[3]

Respondent was the pilot-in-command of an August 27, 1989 flight departing Allentown-Bethlehem-Easton Airport. The Administrator here alleges that respondent began his takeoff roll and climb out before receiving ATC clearance for takeoff. Respondent contends that the high performance aircraft he was piloting[4] allowed him to respond to the clearance much faster than ATC would normally expect, and that he was executing a maximum performance takeoff that day. He testified to his practice of acknowledging the clearance during his takeoff roll, and introduced calculations designed to show that he did not

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[2]Section 91.123(b) provides:

> (b) Except in an emergency, no person may operate an aircraft contrary to an ATC [air traffic control] instruction in an area in which air traffic control is exercised.

No emergency was declared or argued in this case.

Section 91.129(h) reads:

> Clearances required. No person may, at an airport with an operating control tower, operate an aircraft on a runway or taxiway, or take off or land an aircraft, unless an appropriate clearance is received from ATC. A clearance to "taxi to" the takeoff runway assigned to the aircraft is not a clearance to cross that assigned takeoff runway or to taxi on that runway at any point, but is a clearance to cross other runways that intersect the taxi route to that assigned takeoff runway. A clearance to "taxi to" any point other than an assigned takeoff runway is a clearance to cross all runways that intersect the taxi route to that point.

[3]The notice of appeal filed by the Administrator was withdrawn.

[4]A Piper Cheyenne 400 LS. Tr. at 85.

"jump" the clearance.[5]

The law judge, in affirming the Administrator's complaint, found probative the testimony of the Administrator's eyewitnesses. Both the local and ground controller on duty at the time stated that they saw the aircraft well down the runway (approximately even with Taxiway Echo, between 3,000 and 4,000 feet from the takeoff end) just as the controller was finishing issuing the clearance.[6] In closing argument, however, respondent suggested (based on Exhibit R-3, a report of the incident written by the FAA Facility Chief at the airport, Mr. Ivey) that, at the time of takeoff clearance, the aircraft was at Taxiway D, not E, as the controllers testified. Not only was this evidence not supported by testimony of this individual or subject to cross examination, there is no indication that Mr. Ivey witnessed the incident, nor is the report so inconsistent as to make unreliable the testimony of the controllers at the hearing.[7]

There is no dispute that a maximum of 4 seconds passed from the time the local controller began issuing the clearance to the

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[5]The calculations indicated that, on that day, the minimum runway distance for the aircraft, as configured, to become airborne and clear a 50-foot obstacle was 1500 feet. Tr. at 95-97.

[6]See, e.g., Tr. at 42-47, 58, and 68-69.

[7]We also find no merit in respondent's argument, on appeal, that an adverse inference should be drawn because the Administrator did not call Mr. Ivey as a witness. It is within the Administrator's discretion to determine what witnesses he believes necessary to meet his burden of proof. Respondent also had the opportunity to subpoena Mr. Ivey to testify, and did not do so.

time both controllers saw the aircraft.[8] Even assuming the aircraft could perform as respondent testified, we have no basis to hold, as he urges, that it was error for the law judge to accept, instead, the testimony of the two apparently disinterested ATC witnesses (neither of whom worked for the FAA at the time of the hearing). Nor is it a basis for reversal that the controllers did not actually see respondent begin his takeoff roll prior to the clearance. A preponderance of reliable evidence supports the Administrator's complaint and the law judge's decision.

Respondent offered no convincing basis to disregard the eyewitness testimony. He testified that his actions that day would have put him at least 600-700 feet above the tower, and he, therefore, could not have been at 50 feet, as the Administrator's witnesses testified. Tr. at 101. This conflicting testimony raised an issue of witness credibility that the law judge was obliged to and did reasonably resolve. Administrator v. Smith, 5 NTSB 1560, 1563 (1987) (unless arbitrary, capricious or otherwise incredible, credibility determinations are within exclusive province of law judge).

Moreover, the fact that the aircraft could be off the ground in less than 3000-4000 feet (or even 1500 feet), a point on which the parties appear to agree, does not answer the question of

[8]The local controller began issuing the clearance at 1902:33 and the acknowledgment began at 1902:37. See Exhibit A-1 transcript. The ground controller testified: "As soon as the words were out of his [the local controller's] mouth, this aircraft was already airborne midway down the field." Tr. at 58.

whether 4 seconds was enough time for it to become airborne. Significantly undermining his position, respondent admitted that, under the conditions he had described, 4 seconds was not enough time for the aircraft to become airborne. Tr. at 111.[9] On rebuttal, the FAA investigator of this incident confirmed this fact and stated, further, that it would take the aircraft between 11 and 12 seconds under the manual's recommended takeoff procedures to get airborne and clear a 50-foot obstacle 1500 feet from the point of takeoff. Tr. at 122-123. The investigator also testified that it would exceed engine torque limits to take the engine immediately from 30 to 100 percent power, as respondent had testified he had done. Tr. at 99 and 124. Accordingly, there was more than sufficient evidence for the law judge's conclusion, and we can see no error in the law judge's rejection of respondent's internally inconsistent version of events.[10]

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[9]As to credibility generally, we also note that respondent had a companion, Mr. Jacob Barnes, on the flight. Although he identified Mr. Barnes at the hearing, respondent did not offer him as a witness and prior to the hearing refused to identify Mr. Barnes despite a discovery request by the Administrator. Tr. at 5-10. During the hearing, respondent testified that it was Mr. Barnes who acknowledged the takeoff clearance. Id. at 106.

[10]Contrary to the assertion in respondent's brief, Mr. Plantz, the FAA investigator, did not testify that the aircraft, when seen airborne, was at Taxiway B (Appeal at 8). He testified that, if the aircraft had begun its takeoff roll at the start of the takeoff end of the runway, and if its takeoff was consistent with guidelines in its manual, it could reach an altitude of 50 feet at the approximate location of Taxiway B. As with Mr. Ivey, there is no indication in the record that Mr. Plantz even witnessed the incident.

Finally, respondent argues, citing Administrator v. Brasher, 5 NTSB 2116 (1987), that the Administrator failed to adhere to his own policy by failing immediately to advise respondent of his possible violation. Without saying so, respondent apparently believes that no sanction should be imposed for his § 91.123(b) violation in the absence of immediate notification.

Brasher, however, involved an altitude deviation, and we will not extend it to the instant situation. See Administrator v. Brauser, NTSB EA-2490 (1989) at fn. 4, recon. den'd. NTSB EA-2983 (1989); and Administrator v. Scroggins, NTSB Order EA-3466 (1991) at 4-5 (in both cases, we held that Brasher was applicable only to deviations from altitude or separation instructions).

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and

2. The 30-day suspension of respondent's commercial pilot certificate shall begin 30 days from the date of service of this order.[11]

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

[11]For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).